



NEW YORK
STATE OF
OPPORTUNITY.

Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

June 15, 2016

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Cheryl Ackerman, M.D.



David Quist, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

Kevin D. Porter, Esq.
Vigorita, Barker, Porter & Patterson, LLP
115 East Stevens Avenue
Suite 206
Valhalla, New York 10595

RE: In the Matter of Cheryl Ackerman, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 16-205) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Riverview Center
150 Broadway – Suite 355
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,



James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah
Enclosure

**STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

In the Matter of

Cheryl Ackerman, M.D. (Respondent)

**A proceeding to review a Determination by a Committee
(Committee) from the Board for Professional Medical
Conduct (BPMC)**

Administrative Review Board (ARB)

Determination and Order No. 16- 205

COPY

**Before ARB Members D'Anna, Koenig, Grabiec, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner): David A. Quist, Esq.
For the Respondent: Kevin D. Porter, Esq.**

The Respondent holds a medical license in New Jersey in addition to the Respondent's license to practice medicine in New York (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2015), the ARB considers whether to impose any sanction against the Respondent's License after New Jersey placed a number of conditions and limitations on the Respondent's license in that state. After a hearing below, a BPMC Committee voted to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation for three years, under the terms that appear at Appendix II to the Committee's Determination. The Respondent then requested review and asked that the ARB remove any conditions that the Committee's probation terms placed on the Respondent's practice in New York. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination, except that we remove the suspension from the sanction the Committee imposed.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq.*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted a hearing under the expedited hearing procedures (Direct Referral Hearing) in PHL §230(10)(p). The Petitioner charged that the Respondent violated New York Education Law (EL) § 6530(9)(d)(McKinney Supp. 2016) by committing professional misconduct, because the duly authorized professional disciplinary agency from another state, New Jersey, took disciplinary action against the Respondent's medical license in that state for conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York. The Petitioner's Statement of Charges [Direct Referral Hearing Exhibit 1] alleged that the Respondent's misconduct in New Jersey would constitute misconduct if committed in New York, under the following specifications:

- practicing the profession while impaired by mental and/or physical disability, a violation under EL § 6530(7);
- willfully failing to comply with substantial provisions of state law governing the practice of medicine, a violation under EL § 6530(16),
- failing to file a report required by law or by the Department of Health or by the State Education Department, a violation under EL § 6530(21), and/or,
- violating a condition or limitation placed on a license, a violation under EL § 6530(29).

Following the Direct Referral Proceeding, the Committee rendered the Determination now on review. In the Direct Referral Hearing, the statute limits the Committee to determining the nature

and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee demonstrated that the Respondent entered into a 2011 Agreement with the New Jersey State Board of Medical Examiners (New Jersey Board) in which the Respondent agreed to comply with requirements by the New Jersey Professional Assistance Program (PAP) by participating in regular psychotherapy sessions with a PAP therapist, submitting treatment reports and a psychiatric evaluation to PAP and completing a PAP independent psychiatric evaluation. The New Jersey Board issued an Order of Automatic Suspension against the Respondent in February 2012 for her violation of the terms under the 2011 Agreement. Under a November 16, 2015 Consent Order, the New Jersey Board reinstated the Respondent's license subject to conditions and limitations, which included practice while employed by another physician approved by the New Jersey Board. The Consent provides that the Respondent can seek approval to return to solo practice after two years. The Consent also requires the Respondent to undergo a fluoro-deoxyglucose positron emission tomography scan (FDG-PET) and Magnetic Resonance Imaging (MRI) of her brain, to follow-up with a neurologist and to follow-up with her treating psychologist, Ben J. Susswein, Ph.D.

The Committee found that 2011 Agreement resulted from patient care complaints, which the New Jersey Board handled contemporaneously with the diagnosis that the Respondent suffered from adjustment disorder, personality disorder and depressive disorder. The Board found further that the Respondent failed to comply with provisions in the 2011 Agreement that required the Respondent to undergo an evaluation and to provide reports to PAP. The Committee also expressed concern over testimony by the Respondent which indicated her unhappiness with conditions under the 2015 Consent to which the Respondent agreed. In addition, the Committee

found the Respondent in denial concerning her impairment. The Committee cited to testimony by William Richardson, M.D., who examined the Respondent in July 2015. Dr. Richardson testified that his examination found no psychiatric issues, but immediately amended the testimony to state that he found no "significant" psychiatric issues [Hearing Transcript pages 28-29]. Also, a report in evidence assessing the Respondent's fitness to practice by Mijail D. Surruya, M.D., Ph.D., recommended that the Respondent undergo "at minimum" annual follow-ups with a neurologist and a brain MRI, as well as repeat neuropsychological testing should there be any new concerns about cognition. The Committee also expressed concerns about the Respondent's absence from clinical practice in the four years since the 2012 Order of Automatic Suspension.

The Committee found that the 2015 Consent Order provided the basis for disciplinary action against the Respondent under EL § 6530(9)(d). The Committee determined that the Respondent's conduct, if committed in New York, would have constituted violating terms and conditions placed on a license, practicing while impaired by a mental disability and failure to file a report. The Committee dismissed the charge that the Respondent's conduct would also have constituted a violation under EL § 6530(16). The Committee voted to suspend the Respondent's License for three years, to stay the suspension in full and to place the Respondent on probation for three years, under the terms that appear at Appendix II to the Committee's Determination. The probation terms require that the Respondent practice under supervision and that the Respondent continue in treatment as necessary.

Review History and Issues

The Committee rendered their Determination on February 23, 2016. This proceeding commenced on March 7, 2016, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on April 15, 2016.

The Respondent asked the ARB to remove all restrictions on the Respondent's License. The Respondent argued that she did provide reports to New Jersey, that the New Jersey Board acted unlawfully and that the Respondent is fit to practice. In reply, the Petitioner argued that the Respondent submitted material to the ARB from outside the hearing record, that the Appellant sought to re-litigate the New Jersey proceeding and that the hearing record supports the Committee's Determination

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL § 230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS

2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the 2015 Consent provides the basis for disciplinary action in New York and that the Respondent's conduct in New Jersey would constitute professional misconduct if committed in New York. The ARB affirms the Committee's Determination to place the

Respondent on probation for three years under the terms that appear as Appendix II to the Committee's Determination. On our own motion, we overturn the Committee's Determination to suspend the Respondent's License and stay the suspension.

We agree with the Petitioner that the Respondent submitted material to the ARB from outside the hearing record, including references to a procedure that occurred six weeks after the hearing. Under PHL § 230-c(4)(a), the ARB review may consider only the record below and the parties briefs, so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997). The ARB disregarded the material from outside the record.

We also agree that the Respondent attempted to re-litigate the New Jersey proceedings. In a Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). If the Respondent has a problem with the New Jersey proceedings then she should challenge those proceedings in New Jersey. The 2015 Consent Order, which the Respondent signed, bound the Respondent before the Committee and binds the Respondent before the ARB.

The Respondent also argued that the Committee ignored evidence concerning the Respondent's fitness to practice. The ARB finds that the Committee weighed all the evidence before them. The Committee's Determination allows the Respondent to return to practice under restrictions, as does the 2015 Consent Decree. The issue in this case centered on whether the Respondent must practice under restrictions, rather than whether the Respondent is fit to practice at all. The ARB agrees with the Committee that the Respondent must practice on probation for three years due to the diagnoses, the history of non-compliance, the restrictions the Respondent

accepted in New Jersey and the Respondent's absence from clinical practice for the last four years.

On our own motion, the ARB overturns the Committee and removes the stayed suspension from the penalty. The Committee presented no rationale for the stayed suspension and the ARB sees no purpose for the stayed suspension. We find probation necessary, including practice supervision and ongoing treatment as necessary. Under PHL § 230-a (9), however, BPMC may place a licensee on probation with or without any other sanction.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to place the Respondent on probation for three years under the terms that appear at Attachment II to the Committee's Determination.
3. The ARB overturns the Committee's Determination to suspend the Respondent's License for three years and to stay the suspension.

Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Cheryl Ackerman, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Ackerman.

Dated: 8 June, 2015

A large black rectangular redaction box covering the signature of Linda Prescott Wilson.

Linda Prescott Wilson

In the Matter of Cheryl Ackerman, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the Matter of Dr. Ackerman.

Dated: June 8, 2016

A large black rectangular redaction box covering the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Cheryl Ackerman, M.D.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Ackerman.

Dated: 6/6/ 2016



Steven Grabiec, M.D.

In the Matter of Cheryl Ackerman, M.D.

Richard D. Milone, M.D., an ARB Member concurs in the Determination and Order in

the Matter of Dr. Ackerman.

Dated: June 6, 2015

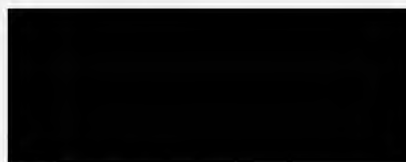


Richard D. Milone, M.D.

In the Matter of Cheryl Ackerman, M.D.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Ackerman.

Dated: JUNE 6, 2015



John A. D'Anna, M.D.